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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1634

SECURITY SAVINGS AND LOAN ASOCIATION OF DICKINSON, TEXAS,
Petitioner

v.

CITY SAVINGS ASSOCIATION,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

CITY SAVINGS ASSOCIATION,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This cause should not be reviewed by this Court and the "Petition For Writ Of Certiorari To The Supreme Court Of The State of Texas" should be dismissed or denied because of each and all of the matters and grounds disclosed herein.

OPINIONS DELIVERED IN COURTS BELOW

The Supreme Court of Texas did not find or conclude that the Hearing Officer merely officially noticed the filing of Respondent's application for a savings and loan charter. The Supreme Court of Texas, as the District

Court had done, interpreted the opening statement made by the Hearing Officer and concluded that the Savings and Loan Commissioner officially noticed Respondent's application when the Hearing Officer officially found that the application contained all of the prerequisites under the Texas Savings and Loan Act. Having reached that conclusion, the Court declared that, thus, the facts and data furnished with the application were officially noticed by the Commissioner and were before him and became a part of the record before the Savings and Loan Commissioner.

The opinion of the Supreme Court of Texas is reported at 560 S.W. 2d 930.

JURISDICTION

This Court is without jurisdiction of this cause for the reason that no federal question is before this Court in this cause and none exists, the questions presented being purely state or local questions.

This Court is without jurisdiction of this cause for the reason that no federal question was presented by Petitioner to the Supreme Court of Texas for decision and no federal question was actually decided by the Supreme Court of Texas.

This Court is without jurisdiction of this cause for the reason that the only possible federal question presented, to-wit, Petitioner's claim of denial of due process of law by the Savings and Loan Commissioner of Texas, was neither timely nor properly raised, below, and has been raised or presented for the first time in this Court.

This Court is without jurisdiction of this cause for the reason that the decision of the Supreme Court of Texas rests on still other independent and adequate state (non-federal) grounds.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Texas Savings and Loan Act, Article 852a, Revised Civil Statutes of the State of Texas [Vernon's Texas Civil Statutes]:

Sec. 2.01. [Appendix p. 27]
Sec. 2.02. [Appendix p. 28]
Sec. 2.03. [Appendix p. 29]
Sec. 2.04. [Appendix p. 29]
Sec. 2.05. [Appendix p. 29]
Sec. 2.06. [Appendix p. 30]
Sec. 2.07. [Appendix p. 30]
Sec. 2.08. [Appendix p. 30]
* * * *
Sec. 11.11. [Appendix p. 31]
Sec. 11.12. [Appendix p. 32]

Texas Rules of Civil Procedure, Rule 503. [Appendix p. 33]

28 U.S.C. § 2111. [Appendix p. 33]

Federal Rules of Civil Procedure, Rule 61. [Appendix p. 33]

QUESTIONS PRESENTED FOR REVIEW

Petitioner's claim that it was denied due process of law, upon judicial review in the District Court, by the admission in evidence of Respondent's application for a savings and loan charter, is a mere fiction.

There were neither pleadings nor proof by Petitioner, upon judicial review, that a motion for rehearing, based upon denial of due process by the Commissioner as a result of his consideration of Respondent's application, had been filed by Petitioner after the order complained of had been entered by the Commissioner and that such motion had been overruled by the Commissioner. And, of course, no motion for rehearing was filed by Petitioner.

There were neither pleadings nor proof by Petitioner, upon judicial review, that the Commissioner did not promptly notify Petitioner of the entry of the order. And, of course, the Commissioner did promptly notify counsel for Petitioner of the entry of the order.

Petitioner's pleadings, upon judicial review, contained no allegation that the order of the Savings and Loan Commissioner was invalid for the reason that the Commissioner's reliance on data furnished with Respondent's application deprived Petitioner of due process of law. Petitioner merely alleged that such data was not officially noticed in the record of the hearing and was not offered in evidence and, hence, that the order was invalid because there was no record support for the Commissioner's findings of ultimate facts (Tr. 75).

Consequently, the only matter which the District Court had before it, when Respondent's application was offered in evidence upon judicial review, was the matter of interpreting the statement which had been made by the Hearing Officer. And, the District Court's interpretation of that statement was the same as that of the Supreme Court of Texas. That determination having been made by the District Court, such evidence was obviously admissible. Article 852a, Sec. 11.12(5) (b), Revised Civil

Statutes of the State of Texas. Stated otherwise, under those circumstances, when Petitioner's objection to the admissibility of the application, upon the grounds that it had not been officially noticed in the record of the hearing, was overruled by the District Court, Petitioner's other objections to the admissibility of the application became inappropriate and moot. Indeed, it would have been either fundamental error or reversible error if the District Court had, then, considered and sustained one of Petitioner's other objections.

The remaining questions presented by Petitioner are actually the presentation of only one question, to-wit, did the Savings and Loan Commissioner's consideration of Respondent's application and reliance on parts of that application deprive Petitioner of due process of law.

The discussion of this question, above, under the heading "Jurisdiction" will not be repeated, here.

There is nothing inherently unconstitutional about the "official notice" doctrine in administrative law. Such arises only from abuse of the doctrine, as in the cases cited and discussed by Petitioner. As will be demonstrated herein, below, the abuse of that doctrine which was present in *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 68 L.Ed. 1016 (1924), and in *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 81 L.Ed. 1093 (1937), is non-existent, here. Petitioner had adequate and sufficient notice of the specific data with which it would be confronted at the administrative hearing. Section 2.08 of the Texas Savings and Loan Act. Petitioner had adequate and sufficient notice that such data would be admissible upon judicial review if officially noticed in the record of the hearing. Section

11.12(5)(b) of the Texas Savings and Loan Act. Petitioner even had notice of the type of statement by the Hearing Officer which would constitute such official notice of that data. *Citizens of Texas Savings & Loan Association v. Lewis, Savings and Loan Commissioner,* 483 S.W.2d 359 (Tex. Civ. App. 1972; ref'd. n.r.e.). Also, in those cases cited by Petitioner the objectionable evidence was heavily relied upon by the administrative agencies.

Contrary to Petitioner's representations to this Court, Respondent's application for charter and the contents thereof were subjected to cross-examination by counsel for Petitioner at the administrative hearing, and Respondent's application for charter was duly verified or sworn to by each and all of Respondent's incorporators.

There was no "failure to follow administrative rules", here, nor "the institution of a new procedure which had the effect of changing the burden of proof." That these generalizations are without any merit has been shown herein under other headings.

STATEMENT OF THE CASE

Petitioner has at least suggested that, when the original order was made by the Savings and Loan Commissioner of Texas granting Respondent's application for a savings and loan charter, the Commissioner did not consider the data furnished with Respondent's application. One only has to examine the Texas Court of Civil Appeals opinion pertaining to judicial review of that original order, quoted in a footnote on page 7 of the Petition for Writ of Certiorari, to conclude that such data furnished with the application was considered and relied

upon, at that time, by the Savings and Loan Commissioner.

Petitioner states that, after the matter was remanded to the Savings and Loan Commissioner pursuant to the aforementioned decision of the Court of Civil Appeals, the Savings and Loan Commissioner entered the amended order without notice, hearing or reopening the record, and that such amended order was based upon the application for charter and data submitted with the application, instruments which were not verified, never offered in evidence, and not subjected to cross-examination.

Petitioner fails to mention that the matter was remanded to the Commissioner for the limited purpose of revising the order as to its form, with no direction or authorization to reopen the hearing.

Petitioner fails to mention, also, that it did not file a motion for rehearing before the Commissioner, when the amended order was entered, alleging as grounds therefor that Petitioner had been deprived of due process of law by the Commissioner as a result of his consideration of and reliance on part of Respondent's application. Such motion for rehearing could have been filed by Petitioner under Section 11.11(5) of the Texas Savings and Loan Act.

Petitioner's statement that Respondent's application for charter and the data furnished with the application were not verified is not correct. Respondent's application for charter was verified, as required by Section 2.01 of the Texas Savings and Loan Act, as evidenced by Intervenor's Exhibits Nos. 1, 2 and 3 (certified copies of the

instruments) and by the finding thereon made by the Savings and Loan Commissioner in the "Amended Order" [Exhibit A, page 25 of Petition for Writ of Certiorari]. A true copy of Respondent's application for charter is a part of the Transcript (Tr. 43).

Petitioner has represented to this Court that the parties to the administrative hearing, including Petitioner, did not consider the data furnished with Respondent's application for charter as being part of the evidence, upon the administrative hearing, and would have this Court believe that Petitioner had no opportunity, at the administrative hearing, to test the accuracy or truth of such data by cross-examination of Respondent's witnesses. The fact is that Petitioner and other protestants not only had the opportunity to do so, upon the administrative hearing, but actually availed themselves of that opportunity.

All of the parties to the administrative hearing recognized that this data furnished with Respondent's application was as much a part of the evidence as was the testimony and exhibits adduced upon the hearing. That this is so is evidenced by the undisputed fact that the 474-page transcript of the proceedings before the Savings and Loan Commissioner entitled "Hearing on Application" contains numerous references to the application and data furnished with it in the cross-examination of Respondent's witnesses by Petitioner and other protestants. For example, at pages 24-30 of that hearing record, Respondent's witness, Lammers, was cross-examined by counsel for Petitioner about some of the data furnished with the application in an attempt to discredit that data and to use some of it to Petitioner's advantage in arguing,

later, that this would not be a locally owned savings and loan association because the stockholder list which was part of the data furnished with the application showed that many of the stock subscribers reside outside of the community to be served by the proposed savings and loan association. That particular cross-examination of Respondent's witness, Lammers, begins on page 24 ("Hearing on Application") with the following question by counsel for Petitioner:

> "Q. This list that is attached—I have the official file, Mr. Lammers, from the Savings and Loan Department, and the list that is attached here on an application for charter, October 24, received here October 24, 1972. Do you recognize this as the stockholder list that you are referring to?"

And, in that same series of questions by counsel for Petitioner, the following question was asked by counsel for Petitioner at page 26 ("Hearing on Application"):

> "Q. Now, on your budget, Mr. Lammers, and it's in that application which is before you—is it your statement to this Commissioner that from mortgage loans of 1.2 million in your first year of operation, you are going to make $90,000 for the association? income."

The statement made by Petitioner that "upon the basis of those documents [Respondent's application for charter] the trial court held that the Commissioner's order granting the application for charter was 'valid as to form' and 'reasonably supported by substantial evidence'" is mere argument, in addition to being incorrect; and the incorrectness of such statement has been shown herein under other headings.

The Supreme Court of Texas, here, in discussing the Texas law since *Gerst v. Nixon,* ____Tex.____, 411 S.W. 2d 350 (1966), concluded with the statement that "Through the process of official notice, the application, including the documents attached to the application as a part of it, becomes a part of the record in the matter. (Citation)" The Supreme Court of Texas, then, after so stating the applicable law, merely interpreted the statement made by the Hearing Officer and, upon doing so, interpreted that statement as constituting official notice by the Savings and Loan Commissioner of the data furnished with the application such that all of the data was before him and became a part of the record before the Commissioner.

Therein lies the heart of this matter, insofar as the jurisdiction of this Court is concerned. The decision of the Supreme Court of Texas rested on purely local or state (non-federal) grounds. The dissenting opinion of two members of the Supreme Court of Texas, as did the opinion of the Court of Civil Appeals, resulted solely from a disagreement among the Justices as to the interpretation to be given to two state court decisions and to the statement by the Hearing Officer. Those two state court decisions are *Gerst v. Nixon, supra,* and *Citizens of Texas Savings & Loan Association v. Lewis, Savings and Loan Commissioner, supra.* This Court has consistently declined to involve itself in such matters, even if this Court might have reached a conclusion to the contrary.

Contrary to the statement of Petitioner, which is mere argument, such interpretation of the Hearing Officer's statement by the Supreme Court of Texas is not in-

consistent with any other statement made by the Hearing Officer upon the administrative hearing.

Nothing in the decision of the Supreme Court of Texas either changes or in anywise affects existing law on either the matter of burden of proof or the matter of burden of persuasion in hearings before the Savings and Loan Commissioner of Texas. Indeed, that this is so is made quite clear in the opinion of the Supreme Court of Texas.

THE ARGUMENT

The State Court Decision Rests on Local Grounds

It has already been pointed out herein, above, that the decision of the state court rests solely on mere interpretation by the state court of two state court decisions and a statement by the Hearing Officer, matters which are purely state or local (non-federal) questions. This Court has consistently held that it has no power to review such matters and that it has no concern about the correctness or incorrectness of the conclusions reached by the state court in such matters. *United Gas Public Service Company v. State of Texas,* 303 U.S. 123, 82 L.Ed. 702 (1937), reh. den., 303 U.S. 667, 82 L.Ed. 1124 (1938); and *Moffitt v. Kelly,* 218 U.S. 400, 54 L.Ed. 1086 (1910).

The State Court Has Not Decided a Federal Question

Respondent has already pointed out herein, above, that Petitioner's claim of being denied due process of law by the evidence ruling of the trial court is a mere fiction. Respondent has already pointed out, also, that Petitioner's claim of being denied due process of law by the Com-

missioner, as a result of his consideration of the data furnished with the application, was neither timely nor properly raised, below. Neither was such claim presented to or decided by the Supreme Court of Texas. And, Respondent has pointed out that the state court's decision rested solely on the state court's interpretation of two state court decisions and interpretation of a statement by the Hearing Officer. The state court did not construe, and did not have to construe, any of the state statutes involved because they are clear and unambiguous.

No federal question was either presented to or decided by the state court, here. This Court has repeatedly held that it is without jurisdiction under those circumstances. *Congress of Industrial Organizations v. Robert E. McAdory*, 325 U.S. 472, 89 L.Ed. 1741 (1944); *Southwestern Bell Telephone Company v. State of Oklahoma*, 303 U.S. 206, 82 L.Ed. 751 (1937); and *Cox v. State of Texas*, 202 U.S. 446, 50 L.Ed. 1099 (1905).

Petitioner Neither Timely Nor Properly Raised the So-Called Federal Question

Neither by motion for rehearing before the Savings and Loan Commissioner of Texas nor by pleadings or motion upon judicial review of the administrative order in the district court, nor, for that matter, in either the Court of Civil Appeals or the Supreme Court of Texas, did Petitioner either allege or contend that consideration by the Savings and Loan Commissioner of the data furnished with Respondent's application for charter deprived Petitioner of due process of law. Likewise, Petitioner did not at either level question the constitutionality of those sections of the Texas Savings and Loan Act which ex-

pressly authorized such consideration of that data by the Savings and Loan Commissioner. Actually, Petitioner has not so questioned those sections of the Texas Savings and Loan Act, here, except perhaps impliedly. Nor has Petitioner even suggested that the District Court and the Texas Supreme Court had to construe those clear and unambiguous statutes in deciding the case.

The law of the State of Texas is the same as the decisions of this Court, insofar as the time and manner of raising or preserving a constitutional point of error is concerned. In an ordinary action, not involving judicial review of an order of an administrative agency, the Supreme Court of Texas has held that it will decline to answer the question where it has not been raised in the trial court. *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959).

This Court has consistently held that when the federal question has not been presented prior to the decision by the court of last resort of the state, it comes too late. *Cox v. State of Texas, supra*; and *Miller v. State of Texas*, 153 U.S. 535, 38 L.Ed. 812 (1893).

This Court has held in a number of cases involving orders of administrative agencies that objections to the proceedings of an administrative agency must be made while it has opportunity for correction in order to raise issues reviewable by the courts, and that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice, and that an objection or claim such as the one being made by Petitioner, here, comes too late, when made for the first time in and by a petition in the District Court

to set aside the administrative order. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 97 L.Ed. 54 (1952); *United States v. Capital Transit Company*, 338 U.S. 286, 94 L.Ed. 93 (1949), reh. den., 338 U.S. 901, 94 L.Ed. 554; *Unemployment Compensation Commission of the Territory of Alaska v. Aragon*, 329 U.S. 143, 91 L.Ed. 136 (1946); *United States Ex Rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 71 L.Ed. 560 (1926); *Federal Power Commission v. Colorado Interstate Gas Company*, 348 U.S. 492, 99 L.Ed. 583 (1954); *National Labor Relations Board v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 97 L.Ed. 377 (1952); and *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 364 U.S. 137, 4 L.Ed.2d 1623 (1960).

Should there be deemed to be a distinction between the cases just cited and the instant case because of the fact that a motion for rehearing before the Commissioner was not mandatory, here, then, as Respondent has already pointed out herein, above, neither did Petitioner in its pleadings upon judicial review in the District Court claim or allege that it had been denied due process of law by the Savings and Loan Commissioner as a result of the Commissioner's consideration of the data furnished with Respondent's application for charter.

Decision of State Court Rests on Still Other Adequate Independent State Grounds

The decision of the Supreme Court of Texas rests on still other and further adequate and substantial independent state or non-federal grounds. It has already been pointed out that, insofar as Petitioner's "official notice"

contention is concerned, the decision of the state court rested on that court's interpretation of two state court decisions and that court's interpretation of a statement made by the Hearing Officer. The decision of the state court rests, also, on adequate and substantial state grounds that have no relation to Petitioner's "official notice" contention.

This Court has consistently held that it will not review a decision by the highest court of a state where there are two grounds for the decision only one of which involves a federal question and the other state or local ground is substantial, adequate and sufficient to maintain or support the judgment of the state court, and this Court will accept the decision whether right or wrong without considering the federal question that may have been presented. *Gaar, Scott & Company v. Shannon*, 223 U.S. 468, 56 L.Ed. 510 (1911); *Waters-Pierce Oil Company v. State of Texas*, 212 U.S. 112, 53 L.Ed. 431 (1908); *Bacon v. State of Texas*, 163 U.S. 207, 41 L.Ed. 132 (1895); *Nickel v. Cole*, 256 U.S. 222, 65 L.Ed. 900 (1920); *Minneapolis, St. Paul, & Sault Ste. Marie Railway Company v. Washburn Lignite Coal Company*, 254 U.S. 370, 65 L.Ed. 310 (1920); *Arkansas Southern Railroad Company v. German National Bank*, 207 U.S. 270, 52 L.Ed. 201 (1907); and *Broad River Power Company v. State of South Carolina*, 281 U.S. 537, 74 L.Ed. 1023 (1929).

There was no evasion of a federal question by the state court, here. Petitioner has at least suggested that the Supreme Court of Texas would not concern itself with a federal question, even if timely and properly raised, if the administrative order is otherwise reasonably sup-

ported by substantial evidence. That this is not so is shown in *Lewis, Savings and Loan Commissioner v. Metropolitan Savings and Loan Association,* ____Tex. ____, 550 S.W.2d 11 (1977). See, also, *Lewis, Savings and Loan Commissioner v. Guaranty Federal Savings and Loan Association,* 483 S.W.2d 837 (Tex. Civ. App. 1972; writ of error denied by Supreme Court of Texas with the notation "Refused. No Reversible Error").

The exceptions to the adequate independent state grounds doctrine, represented by *Fay v. Noia,* 372 U.S. 391, 9 L.Ed.2d 837 (1963), and *Henry v. Mississippi,* 379 U.S. 443, 13 L.Ed.2d 408 (1965), obviously are not applicable, here. This is neither a habeas corpus proceeding nor a direct review of a judgment in a criminal case involving a decision resting on independent state grounds which are purely procedural and serve no legitimate state interest.

The Supreme Court of Texas held, here: "However, even if it may be said the application was erroneously admitted into evidence in the trial court, it was not essential to support the Commissioner's order"; that those portions of the application which were used by the Commissioner "in finding the underlying facts supporting his order" were "also included in the direct testimony by witnesses and exhibits offered by the applicants for the charter, thus the documents were cumulative of the direct evidence offered before the Commissioner".

Respondent's application for writ of error in the Supreme Court of Texas was granted on the sole point that the Court of Civil Appeals had erred in holding that the admission in evidence by the District Court of Respondent's application for charter amounted to such a

denial of Petitioner's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case. Then, upon submission of the case, the Supreme Court of Texas decided the additional points of error contained in Respondent's application for writ of error.

It has been held that the purposes to be served by requiring statements of underlying facts in an order of the Savings and Loan Commissioner [required by Section 11.11(4) of the Savings and Loan Act] are to inform the losing party of the testimony and other evidence relied upon by the Commissioner so that such party may intelligently prepare and present an appeal from such order to the District Court and to assist the District Court and appellate courts in properly exercising their function of reviewing that order. *Security Savings and Loan Association of Dickinson v. Lewis, Savings and Loan Commissioner,* 515 S.W.2d 392 (Tex. Civ. App. 1974; no writ). To the same effect, although involving an order of the Railroad Commission, is *Miller v. Railroad Commission of Texas,* ____Tex.____, 363 S.W.2d 244 (1962).

Contrary to what Petitioner would have this Court believe, the bulk of the contents of the documents comprising Respondent's application for charter were not even considered or relied upon by the Savings and Loan Commissioner, as is evidenced by the statements of underlying facts in the order. Insofar as that very small portion of the contents of the application which were relied upon and utilized in the order as underlying facts is concerned, most of such evidence is merely cumulative of other competent evidence to the same effect or of

like import contained in the Commissioner's certified record and the remainder of such evidence is wholly immaterial.

It has been held that the erroneous admission of evidence is not grounds for and does not justify reversal of a judgment, where such objectionably evidence is merely cumulative of other competent evidence to the same effect or of like import. *Lynch Oil Company v. Shepard,* 242 S.W.2d 217 (Tex. Civ. App. 1951; writ ref'd.); *Hanks v. LaQuey,* 425 S.W.2d 396 (Tex. Civ. App. 1968; ref'd. n.r.e.); *Lusinger v. Philpott,* 392 S.W.2d 217 (Tex. Civ. App. 1965; ref'd. n.r.e.); *Aetna Casualty & Surety Company v. Depoister,* 393 S.W.2d 822 (Tex. Civ. App. 1965; ref'd n.r.e.); *Blakney v. Panhandle & Santa Fe Railway Company,* 381 S.W.2d 143 (Tex. Civ. App. 1964; ref'd n.r.e.); *Drake v. Walls,* 348 S.W.2d 62 (Tex. Civ. App. 1961; ref'd. n.r.e.); *Brown v. Dale,* 395 S.W.2d 677 (Tex. Civ. App. 1965; ref'd. n.r.e.); and *Mueller v. Central Power & Light Company,* 403 S.W.2d 901 (Tex. Civ. App. 1966; no writ).

Likewise, it has been held that the erroneous admission of evidence is not grounds for and does not justify reversal of a judgment, where such evidence is wholly immaterial (that is, where the case does not turn on such evidence). *Kirby Lumber Company v. Southern Lumber Company,* 192 S.W.2d 460, aff'd., 145 Tex. 151, 196 S.W.2d 387 (1946); *Miller v. Esunas,* 401 S.W.2d 150 (Tex. Civ. App. 1966; ref'd. n.r.e.); *Altum v. Booth,* 399 S.W.2d 836 (Tex. Civ. App. 1966; no writ); and *Flores v. Missouri-Kansas-Texas Railroad Company,* 365 S.W.2d 379 (Tex. Civ. App. 1963; ref'd. n.r.e.).

It is, also, the law of the State of Texas that error in admitting evidence in a non-jury trial is not grounds for and does not justify reversal of the judgment of the district court, where there is other competent evidence to support the judgment. Furthermore, it will be presumed that the district court disregarded the inadmissible evidence. *Fulbright v. Culbertson,* 429 S.W.2d 179 (Tex. Civ. App. 1968; ref'd. n.r.e.); *Sharkey v. Hollums,* 400 S.W.2d 353 (Tex. Civ. App. 1966; ref'd. n.r.e.); *Haynes v. Henderson,* 345 S.W.2d 857 (Tex. Civ. App. 1961; ref'd. n.r.e.); *Stevens Brothers v. Mills,* 336 S.W.2d 921 (Tex. Civ. App. 1960; ref'd. n.r.e.); *Yzaguirre v. State of Texas,* 427 S.W.2d 687 (Tex. Civ. App. 1968; no writ); *Brunswick Corporation v. Suburban Bowling, Inc.,* 398 S.W.2d 294 (Tex. Civ. App. 1967; no writ); and *Hall v. Hall,* 352 S.W.2d 765 (Tex. Civ. App. 1962; no writ).

Such is the case, here. That is to say, as is shown by the statements of underlying facts in the order of the Savings and Loan Commissioner, which has been reproduced in the Petition For Writ of Certiorari as Exhibit A (page 25 thereof), there is other competent evidence in the Commissioner's certified record to support the ultimate findings made by the Commissioner and the judgment of the District Court. Upon consideration of the other competent evidence, of which the objectionable evidence was merely cumulative, it cannot be reasonably concluded that the Commissioner or the District Court would have reached a contrary result if the Commissioner and the District Court had had before them for their consideration only such other competent evidence. This is precisely what the Supreme Court of Texas has held, here.

It was not the function of the District Court to determine *de novo* the ultimate issues under Section 2.08 of the Texas Savings and Loan Act. The function of the District Court was to make a determination on a pure question of law, to-wit, whether or not the Commissioner acted arbitrarily and without regard to the facts; and, the principal test applicable thereto is whether or not the Commissioner's ultimate findings are reasonably supported by substantial evidence. *Gerst v. Nixon, supra.* It has already been pointed out herein, above, that one of the purposes to be served by requiring statements of underlying facts in an order of the Savings and Loan Commissioner is to assist the District Court in properly exercising his function of reviewing that order. Consequently, in performing that judicial function, the District Court must review the same evidence which the Commissioner relied upon, as reflected in the statements of underlying facts in the order. And, the presumption is, under the authorities cited herein, above, that in doing so the District Court disregarded the inadmissible evidence and considered only the other competent evidence in the Commissioner's certified record.

Respondent probably does not have to demonstrate to this Court, under the adequate independent state grounds doctrine, as it did in the Supreme Court of Texas, that the evidence complained of was either cumulative of other competent evidence in the Commissioner's certified record or was wholly immaterial and that, consequently, the Supreme Court of Texas was correct in reaching the conclusion which it did on that point. However, Respondent is sufficiently uncertain of that portion of the adequate independent state grounds doctrine having to do with this Court's lack of power to decide the correctness or incorrectness of the state court's decision on such grounds, that Respondent deems it necessary to demonstrate this point to at least some extent, here, although not to the lengths that Respondent did so in the Supreme Court of Texas.

It has already been pointed out that the order of the Savings and Loan Commissioner has been reproduced as an exhibit in the Petition For Writ of Certiorari. The evidence complained of is easily distinguishable from the other competent evidence in the Commissioner's certified record. References in the statements of underlying facts in the order to "H. on Appl., p. . . ." and to "Applicant's Exhibit No. . . ." are references to that other competent evidence in the Commissioner's certified record. By comparing the one with the other, on each ultimate finding of fact made by the Commissioner, the inescapable conclusion is reached that the decision of the Supreme Court of Texas and of the District Court on this point was a correct one. For example, without laboring the point, it can be seen that the data furnished with the application which was utilized as underlying fact 1e [page 29 of the Petition For Writ of Certiorari] is merely cumulative of the other competent evidence utilized as underlying facts 1g and 1j [page 30 of the Petition For Writ of Certiorari].

All of the other competent evidence of which the objectionable evidence is merely cumulative was received in evidence without objection, upon the hearing before the Savings and Loan Commissioner.

Contents of the application utilized as underlying fact 1d in the order are wholly immaterial because the "prerequisite" to which such evidence pertains is not "applicable". It is not applicable because such stock obviously

cannot be issued by Respondent until its application for a savings and loan association charter has been finally approved through the final adjudication of this cause. Likewise, for the same reasons, that portion of the contents of the application utilized as underlying fact 1f pertaining to "in advance of issuance" is wholly immaterial.

The only issues which were actually contested, in the sense of both sides adducing evidence thereon at the hearing, were the issues pertaining to public need, volume of business and possible undue harm to existing associations, those issues being the requirements under Sections 2.08(3) and 2.08(4) of the Savings and Loan Act. On those issues, in only one instance were contents of the application utilized in the order as underlying facts. That one instance was the evidence utilized as underlying facts 9b [page 39 of the Petition For Writ of Certiorari] and 10a [page 51 of the Petition For Writ of Certiorari], and was some of the contents of the instrument entitled "City Savings Association — League City, Texas — Projected Income and Expense". That instrument or document was part of the data furnished with Respondent's application. Counsel for Petitioner and counsel for other protestants had examined that instrument or document in connection with their examination of Respondent's entire application for charter, prior to the hearing before the Commissioner; had such instrument or document before them at the hearing; and cross-examined Respondent's witness, Lammers, at length about the contents of such instrument or document (H. on Appl., pages 26-30). In addition, that particular evidence, too, was merely cumulative of other competent evidence utilized in the underlying facts supporting the ultimate findings on public need, sufficient volume of business and no undue harm to existing associations.

Rule 503, Texas Rules of Civil Procedure, is not unlike 28 U.S.C. § 2111 and Rule 61, Federal Rules of Civil Procedure. And, the decisions of the federal courts are completely consistent and compatible with the Texas cases cited herein, above, construing Rule 503, on the matter of any error in the admission or exclusion of evidence being harmless where the evidence allegedly improperly admitted or excluded was merely cumulative of other competent evidence of like or similar import. *Selected Investments Corporation v. Duncan*, 260 F.2d 918 (10th Cir. 1958), cert. den., 359 U.S. 914, 3 L.Ed. 2d 576 (1959); *American Motorists Insurance Company v. Landes*, 252 F.2d 751 (5th Cir. 1958); *Brooks v. Texas General Indemnity Company*, 251 F.2d 15 (5th Cir. 1958); *Gordon v. Robinson*, 210 F.2d 192 (3rd Cir. 1954); and *Masterson v. Pennsylvania Railroad Company*, 182 F.2d 793 (3rd Cir. 1950).

The decision of the Supreme Court of Texas rests on substantial, adequate and sufficient independent state or non-federal grounds.

CONCLUSION

No federal question is before this Court. No federal question was before the Supreme Court of Texas. No federal question was decided by the Supreme Court of Texas. No federal question was either timely or properly raised, below, by Petitioner. The only possible federal question in this cause has been raised and presented for the first time in this Court. The decision of the Supreme

Court of Texas rests on adequate and substantial independent non-federal or state grounds.

The Petition For Writ of Certiorari should be dismissed. In the alternative, the Petition For Writ of Certiorari should be denied. In either event, all costs should be taxed against Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dow H. Heard, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three (3) copies of the foregoing "Brief in Opposition to Petition for Writ of Certiorari" on counsel for Petitioner by depositing same in a United States post office, with first class postage prepaid, addressed to Mrs. Mary Joe Carroll, P. O. Box 1148, Austin, Texas. 78767, on this 12th day of June, 1978.

DOW H. HEARD

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Texas Savings and Loan Act, Article 852a, Revised Civil Statutes of the State of Texas:

"Sec. 2.01. Application for a charter for a savings and loan association may be made by five (5) or more citizens of this State (hereinafter referred to as incorporators) by tendering to the Commissioner along with the proper filing fee, an application consisting of the following:

"(1) Two (2) copies of Articles of incorporation for the proposed association stating (i) the name of the association, (ii) the site of the principal office and (iii) the names and addresses of the initial directors.

"(2) A statement as to (i) the amount, if any, of Permanent Reserve Fund Stock which has been subscribed and paid for at the time of filing, (ii) the names and addresses of such subscribers and the amount subscribed by each, (iii) the amount of savings liability, if any, with which the association will commence business, (iv) the amount of paid-in surplus or expense fund with which the association will commence business.

"(3) Two (2) copies of the bylaws under which the association proposes to operate.

"(4) Statements, exhibits, maps and other data sufficiently detailed and comprehensive as to enable the Commissioner to pass upon the matters set forth in Section 2.08(2), (3) and (4) of this Act and such other information in regard to the proposed association and its operation as may be required by duly promulgated rules and regulations of the Commissioner and the Building and Loan Section of the Finance Commission of Texas.

"The Articles of incorporation and all statements of fact tendered to the Commissioner in connection with an application for charter shall be subscribed and sworn to under the sanction of an oath, or such affirmation as is by law equivalent to an oath, made before an officer authorized to administer oaths.

"Sec. 2.02 The charter of an association may provide for the issuance of Permanent Reserve Fund Stock. No other form or type of stock or shares may be issued. Such Permanent Reserve Fund Stock, when issued, may not be retired or withdrawn except as hereinafter provided, until after all liabilities of the association shall have been satisfied in full, including the withdrawal value of all savings accounts. Such stock must be fully paid for in cash in advance of issuance and the association may not make any loans against the shares of such stock. Shares of such stock may be issued with par value of not less than One Dollar ($1) nor more than One Hundred Dollars ($100). With the prior written approval of the Commissioner as to the number of shares to be issued, the bylaws of an association may provide that its Permanent Reserve Fund Stock may be issued with no par value. An association authorized to issue such stock must have at all times issued and outstanding stock with a value on its books of at least Twenty-five Thousand Dollars ($25,000) or two and one-half per cent (2½%) of its gross assets, whichever is greater, but no association shall be required to have an amount of such stock with a value on its book of more than Two Hundred and Fifty Thousand Dollars ($250,000). Associations whose savings accounts are insured by the Federal Savings and Loan Insurance Corporation may retire in whole or in part any such stock heretofore issued when such associations are authorized to do so by a majority vote at any annual meeting of its members, or any special meeting of members called

for such purpose; provided, that the basis of such retirement shall have been first approved by the Commissioner and consent to such retirement upon the part of the Federal Savings and Loan Insurance Corporation has been filed in writing with the Commission.

"Sec. 2.03. Incorporators of proposed associations with authority to issue Permanent Reserve Fund Stock, as a prerequisite to the approval of an application for a charter shall be required to have subscribed and paid for in cash to the credit of the proposed association an aggregate amount of Permanent Reserve Fund Stock as the Commissioner shall specify within the limits set for such stock in the preceding Section. Such stock shall be issued within thirty (30) days from the date of incorporation.

"Sec. 2.04. As a prerequisite to approval of any application for a proposed association with authority to issue Permanent Reserve Fund Stock the Commissioner may require in addition to the amount paid in for such stock a paid-in surplus up to but not in excess of the aggregate amount of the Permanent Reserve Fund Stock required under the preceding Section. Such paid-in surplus may be used in lieu of earnings to pay organization and operating expenses, dividends on savings accounts and to meet any loss reserve requirements. If the application should not be approved or if the proposed association does not proceed to do business, the stock subscriptions for Permanent Reserve Fund Stock and paid-in surplus shall be returned pro-rata to the subscribers, less any lawful expenditures.

"Sec. 2.05. As a prerequisite to the approval of an application for a charter of an association without Permanent Reserve Fund Stock the incorporators must show to the satisfaction of the Commissioner . . .

"Sec. 2.06. In addition to the savings account subscriptions required by the preceding Section the incorporators of an association without Permanent Reserve Fund Stock must show to the satisfaction of the Commissioner . . .

"Sec. 2.07. When a proper application for a charter has been filed, the Commissioner shall cause public notice of such application to be given and give any interested party an opportunity to appear, present evidence and be heard for or against such application.

"Sec. 2.08. The Commissioner shall not approve any charter application unless he shall have affirmatively found from the data furnished with the application, the evidence adduced at such hearing and his official records that:

"(1) The prerequisites, where applicable, set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 have been complied with and that the Articles of incorporation comply with all other provisions of this Act;

"(2) the character, responsibility and general fitness of the persons named in the Articles of incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act and that the proposed association will have qualified fulltime management;

"(3) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation;

"(4) the operation of the proposed association will not unduly harm any existing association.

"If the Commissioner so finds, he shall state his findings in writing and issue under his official seal a certificate of incorporation and deliver a copy of the approved Articles of incorporation and bylaws to the incorporators and retain a copy thereof as a permanent file of his office, whereupon the proposed association shall be a corporate body with perpetual existence unless terminated by law and may exercise the powers of a savings and loan association as herein set forth.

* * * * *

"Sec. 11.11. (1) . . . Notice of all other hearings held under any provision of this Act shall be given to all associations and Federal associations in the county where the subject matter of the hearing is or will be situated.

"(2) Opportunity shall be afforded any interested party to respond and present evidence and argument on all issues involved in any hearing held under any provision of this Act.

"(3) Upon the written request of any interested party the Commissioner shall keep a formal record of the proceedings of any hearing held under any provision of this Act.

"(4) . . . [set out by Petitioner]

"(5) A decision or order entered after hearing shall be final and appealable fifteen (15) days after the day the same is entered unless a motion for rehearing is filed by a party within such time and if the motion for rehearing is overruled such decision or order shall be final and appealable from and after the date the order overruling such motion is entered.

"(6) Parties to a hearing shall be promptly notified either personally or by mail of any decision, order or other action taken in respect to the subject matter of the hearing.

"Sec. 11.12. Any party with an interest in the subject matter thereof who is dissatisfied with any act, order, ruling or decision of the Commissioner taken or made, or with any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission in connection with the administration of this Act, may secure judicial review thereof in the following manner:

"(1) Venue. (a) . . . .

"(b) Proceedings for review of other acts, orders, rulings or decisions of the Commissioner or of any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission may be instituted by filing a petition as in a civil action generally against the Commissioner, as defendant, in a district court of Travis County and not elsewhere.

"(2) Time for Filing. Any petition for judicial review must be filed within thirty (30) days after the action, order, ruling or decision of the Commissioner is final or the rule or regulation complained of is promulgated.

"(3) Stay of Enforcement. . . . .

"(4) . . . . [set out by Petitioner]

"(5) Trial. (a) . . . .

"(b) . . . . [set out by Petitioner]

"(6) Burden of Proof and Judgment. The burden of proof shall be on the plaintiff. The reviewing court may affirm the action complained of or remand the matter to the Commissioner for further proceedings.

"(7) Appeals. Appeals from any final judgment may be taken by either party in the manner provided for in civil actions generally, . . ."

Texas Rules of Civil Procedure, Rule 503:

". . .

"Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that an error of law has been committed by the trial court in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, . . .

". . ."

28 U.S.C. § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure, Rule 61:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."